Supreme Court, U.S.
FILED
001897 JUN 19 2001
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NO.

In the
Supreme Court of the United States

BRIAN W. COOPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED FOR REVIEW

May a defense attorney effectively waive, as opposed to forfeit, his client's Sixth Amendment right to confront his accusers when the accuser is an anonymous tipster not present at trial and when the client did not personally participate in the waiver?

LIST OF PARTIES TO THE PROCEEDING

Parties Below:

Petitioner is Brian W. Cooper, presently incarcerated. Petitioner is an individual with no corporate affiliations. Respondent is the United States of America.

Parties Before This Court:

The parties before this Court are the same parties as below. The Petitioner before this Court is the Appellant below. The Petitioner has no corporate affiliations. The Respondent before this Court is the Appellee below.

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PRAYER FOR RELIEF

Petitioner, Brian W. Cooper, respectfully asks this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on March 21, 2001.

OPINION BELOW

The United States Court of Appeals for the Seventh Circuit issued its opinion in this case on March 21, 2001. *United States v. Cooper*, 243 F.3d 411 (7th Cir. 2001). This decision is reproduced in App. A at 1a-14a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on March 21, 2001. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), since this is a final judgment from a United States Court of Appeals.

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On April 16, 1999, Officer Mark Jaeger of the Wausau, Wisconsin police department received a telephone call from Detective Beecher of the Vice Unit of the Milwaukee police department. Beecher informed Jaeger that he had just received an anonymous tip that there was a black man named Brian Cooper who was traveling to the Wausau area by Greyhound carrying several ounces of cocaine. According to Beecher, the tipster provided several details, including the facts that Cooper was due to arrive in Wausau on a Greyhound bus at 7:15 p.m., and that he would be wearing either a gray "FUBU style" jacket or black leather jacket with some writing on it. App. A at 2a.[1]

Relying on this information, officers Jaeger and Peters drove to the Greyhound bus station and waited for Cooper's arrival. At approximately 7:15 p.m., they observed a black male wearing a black leather jacket with writing on it exit the bus, retrieve a blue duffel bag, and enter the side door of a waiting Chevy Impala. Jaeger believed that this was the individual about whom he had received the tip. After the car drove off, Jaeger and several officers followed the Impala for approximately five to seven minutes, and eventually stopped the car for a traffic violation. App. A at 2a; TT at 1- 29.

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[1]Citations to the Court of Appeals opinion are designated "App. A at ___." Citations to the trial transcript designated "TT at ___."

Officer Jaeger eventually searched the Impala after his police dog alerted to the presence of drugs inside the car. Upon that search, Jaeger found a pack of cigarettes with some plastic hanging out of the flap. When he opened the cigarette pack, Jaeger found a brownish, chunky substance, which turned out to contain cocaine. The officers found no other drugs either in Cooper's duffel bag or the rest of the car. Subsequent fingerprint tests on the cigarette pack and on the bag containing the drugs yielded no identifiable prints. App. A at 3a.

Cooper was then arrested and charged with knowingly and intentionally possessing, with intent to distribute, cocaine base, schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1). Jemeir Brown, the driver of the car, was also arrested after the police located the drugs. However, he was never charged with any drug related offenses, despite the fact that he had been arrested less than two weeks prior for possession of marijuana in his Chevy Impala. App. A at 3a; TT at 1- 140.

Before trial, Cooper's counsel filed, *inter alia*, a motion in limine to exclude the existence of the anonymous tip and to exclude the fact that a Milwaukee police detective was the source of the information passing along the tip. The Magistrate addressed the motion in limine at the final pre-trial conference hearing. In response to the Magistrate's inquiry on the motion, the government responded that it believed case law clearly supported the admissibility of the fact that the tip was received by the police. Cooper's counsel then responded that he would withdraw the motion because he had no objection to the tip coming in due to newly discovered evidence, and due to the fact that he believed the tip "would come in to explain the officer's actions as far as the tip". App. A at 3a-4a.

At trial, the government referred extensively to the substance of the anonymous tip. In its opening statements, the government stated that it anticipated the evidence would show that "[o]n April 16, 1999, law enforcement officers up in Wausau, Wisconsin received a tip by telephone and in that tip they learned that an individual would be arriving in Wausau that evening on the bus and a description matching Mr. Cooper and that individual would be carrying a quantity of drugs." Later, through its direct examinations of various police officers, the government brought out more details of the tip, including the tipster's prediction that "a black male by the name of Brian Cooper" was coming to Wausau carrying several ounces of cocaine. Finally, in its closing argument, the government explained that Officer Jaeger received a "very accurate" tip that an individual was coming to Wausau carrying drugs. At no point did Cooper's counsel object to any of the government's references to either the existence of the tip or the substance of the tip. App. A. at 4a-5a.

At the conclusion of the trial, Cooper was convicted of knowingly and intentionally possessing, with intent to distribute, a cocaine base, Schedule II controlled substance in violation of 21 U.S.C. § 841(a)(1). App. A at 6a.

On appeal, Cooper argued, *inter alia*, that the government's repeated reference to the substantive details of the anonymous tip violated his Sixth Amendment right to confront his accusers, and the district court committed plain error under Federal Rule of Criminal Procedure 52(b) by allowing the government to introduce such evidence. However, the Court of Appeals found that there was no error to correct in this case because Cooper waived, as opposed to forfeited, any objection to the admission of the substantive details of the anonymous tip. In analyzing Cooper's challenge under the Sixth Amendment, the Court of Appeals noted that

Cooper did not personally waive his right to object to the details of the tip. However, the court held that Cooper's counsel, through his actions, effectively waived Cooper's right to challenge the admission of the substantive details under the Sixth Amendment. App. A. at 12a-14a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION IN THIS CASE CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS ON AN IMPORTANT AND UNRESOLVED CONSTITUTIONAL ISSUE

In *Olano v. Gray*, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993), this Court outlined the critical distinction between waiver and forfeiture for parties seeking review of evidence not objected to at trial. As this Court noted, while an appellate court may chose to enforce rights that were forfeited during trial, it has no power to enforce rights that were waived at trial. *Olano*, 507 U.S. at 732-33. Regarding the waiver of rights, this Court noted that "[w]hether a particular right is waivable; whether the defendant must personally participate in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary all depend on the right at stake." *Id.* at 533.

In this case, the right at take is the Sixth Amendment right to confront an accuser. Petitioner's accuser is an anonymous tipster not present at trial. As to this right, the Seventh Circuit here held that Petitioner, via the actions of his counsel, waived, as opposed to forfeited, his Sixth Amendment right to challenge to the admission of the

substantive details of the tip implicating him. In reaching this decision, the Court of Appeals held that a defense attorney can effectively waive his client's Sixth Amendment right to confront his accusers so as long as the defendant does not dissent from the decision and the decision is a legitimate trial tactic. *See* App. A. at 13a-14a.

As that holding is in conflict with decisions from other circuits, and this case involves important and unresolved questions of constitutional law, *certiorari* should be granted.

A. The Court of Appeals' Holding That A Defense Attorney Can Effectively Waive His Client's Sixth Amendment Right To Confront His Accusers Is In Conflict With Decisions From Other Circuits.

In finding that Petitioner waived his rights under the Sixth Amendment, the Court of Appeals held that a defense attorney may effectively waive his clients Sixth Amendment confrontation right so long as the defendant does not dissent from the decision and so long as the attorney's decision was a legitimate trial tactic. App. A at 13a-14a. There is currently a split of authority in the circuits on that issue.

The Court of Appeals' holding in this matter is consistent with decisions from the Second, Fifth, Ninth and Tenth circuits. *See*, *United States v. Plitman*, 194 F.3d 59, 64 (2d Cir. 1999) (defense counsel may waive his client's Sixth Amendment right to confrontation where the defendant does not dissent and the attorney's decision is one of trial tactics or strategy); *United States v. Reveles*, 190 F.3d 678, 683 n.6 (5th Cir. 1999) (same); *Hawkins v. Hannigan* 185 F.3d 1146, 1155-56 (10th Cir. 1999) (same); *United States v. Goldstein*, 532 F.2d 1305, 1315 (9th Cir. 1976) (holding that

admission of evidence by stipulation need not be accompanied by a formal waiver from the defendant).

However, these decisions are in conflict with decisions from the Sixth and Eighth circuits. See, *Carter v. Sowders*, 5 F.3d 975, 981 (6th Cir. 1993) ("[E]ven if [an Attorney's] actions . . . could constitute a waiver of the defendant's rights under the Confrontation Clause, the waiver should not bind the defendant in the absence of a showing that he consented."); *Clemmons v. Delo*, 124 F.3d 944, 956 (8th Cir. 1997) ("[T]he law seems to be clear that the right to confrontation is personal and fundamental and cannot be waived by counsel." (citing *Brookhart v. Janis*, 384 U.S. 1, 7, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966)).

Thus, the circuits are split on the Constitutional issue of whether a defense attorney can effectively waive his client's rights under the Sixth Amendment Confrontation Clause, and this Court should grant *certiorari* to resolve that conflict.

B. The Issue Of Whether A Defense Attorney Can Effectively Waive, As Opposed To Forfeit, His Client's Sixth Amendment Right To Confront His Accusers When The Accuser Is An Anonymous Tipster Not Present At Trial And When The Client Does Not Participate In The Waiver, Is An Important Constitutional Question

As outlined *supra*, there is a split of authority in the circuits on the issue of whether a defense attorney can effectively waive his client's rights under the Sixth Amendment's Confrontation Clause without his client's consent. Regarding this waiver of constitutional rights, this

Court has recognized that certain rights of a defendant may be effectively waived by the actions of his counsel. *See e.g.*, *New York v. Hill*, 528 U.S. 110, 114, 145 L. Ed. 2d 560, 120 S. Ct. 659 (2000) (holding that scheduling matters related to trial are within counsel's control). However, this Court has also noted that a criminal defendant must personally participate in the waiver of certain fundamental rights for the waiver of those rights to be effective. *See e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464-465, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938) (defendant must personally participate in the waiver of the right to counsel); *Brookhart v. Janis*, 384 U.S.1, 7-8, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966) (counsel can not waive defendant's right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him.)

While this Court has not directly addressed the issue of whether a defendant's Sixth Amendment right to confront his accusers is a fundamental right such that a defendant must "personally participate" in the waiver for that waiver to be effective, it has long recognized the importance of a defendant's rights under the Sixth Amendment's Confrontation Clause. *See Coy v. Iowa*, 487 U.S. 1012, 1017, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988) ("There is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'") (citations omitted); *See also California v. Green*, 399 U.S. 149, 158, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970) (holding that the Confrontation Clause "forces the witness to submit to cross-examination, 'the greatest legal ever invented for the discovery of truth'") (citations omitted). Further, this particular case involves an anonymous tipster whose identity was not even known to the Petitioner. This Court has recently recognized the inherent unreliability of such evidence. *See Florida v. J.L.*, 529 U.S.

266, 274, 146 L. Ed. 2d 254, 120 S. Ct. 1375 (2000) (holding that anonymous tip lacking indicia of reliability does not justify a stop and frisk.)

Thus, pursuant to this Court's long line of authority, the "right at stake" here is an important Constitutional right. Further, there is an unresolved Constitutional question as to whether a defendant is bound by his counsel's waiver of that right. As such, this case provides this Court with an perfect opportunity to clarify the important Constitutional issues of whether "a defendant's Sixth Amendment right to confront his accusers is waivable; whether he must participate in that waiver; whether certain procedures are required for that waiver; and whether the defendant's choice must be informed or voluntary."[2] *See Olano*, 507 U.S. at 733.

CONCLUSION

For the aforementioned reasons, Petitioner, Brian W. Cooper, respectfully requests that this Honorable Court grant *certiorari*, reverse the decision of the Court of Appeals for the Seventh Circuit, and remand for further proceedings.

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[2]Petitioner notes that he only asks that this Court to grant *certiorari* on the limited issue of whether his counsel could effectively waive his Sixth Amendment right to confront his accusers when the accuser was an anonymous tipster not present at trial, and when Petitioner did not personally participate in the waiver. Petitioner does not ask this Court to determine whether his challenge to the tip evidence would succeed under the plain error analysis. Rather, Petitioner merely asks for a finding that his Sixth Amendment rights were forfeited, and not waived.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Decided March 21, 2001]

No. 00-1195

United States of America,)
Plaintiff-Appellee,)
)
v.)
)
Brian W. Cooper,)
Defendant-Appellant.)
)

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 99 CR 62--John C. Shabaz, *Chief Judge*.

ARGUED DECEMBER 7, 2000--DECIDED MARCH 21, 2001

BEFORE BAUER, MANION, AND ROVNER, *Circuit Judges*.

BAUER, *Circuit Judge*. Brian W. Cooper appeals his conviction for knowingly and intentionally possessing a cocaine base with intent to distribute. He asks for a new trial, arguing that the district court committed plain error by

allowing the government both to introduce testimony regarding the substance of an anonymous tip implicating Cooper and to make repeated reference to the substance of the tip throughout his trial. Because we find that Cooper has waived any error regarding the admissibility of the substance of the tip, we affirm.

BACKGROUND

On April 16, 1999, Officer Mark Jaeger of the Wausau, Wisconsin police department received a telephone call from Detective Beecher of the Vice Unit of the Milwaukee police department. Beecher informed Jaeger that he had just received an anonymous tip that there was a black man named Brian Cooper who was traveling to the Wausau area by Greyhound bus carrying several ounces of cocaine. According to Beecher, the tipster had provided several details, specifically that Cooper was due to arrive in Wausau on a Greyhound bus at 7:15 p.m., and that he would be wearing either a gray "FUBU style" jacket or black leather jacket with some type of writing on it and carrying a duffel bag.

Relying on this information, officers Jaeger and Peters drove to the Greyhound bus station and waited for Cooper's arrival. At approximately 7:15, they observed a black male wearing a black leather jacket with writing on it exit the bus, retrieve a blue duffel bag, and enter the passenger side door of a waiting Chevy Impala. They also saw the man place his duffel bag in the Impala before sitting in the passenger front seat. After the car drove off, Jaeger and several other officers followed it for approximately five to seven minutes until one of the officers eventually stopped it for a traffic violation. As the officer was writing up the traffic citation in his squad car,

he watched Cooper and Jemeir Brown (the driver of the Impala) moving around inside the vehicle, and he noticed Cooper bend over at the waist towards the floor of the vehicle. The officers then ordered both men to get out of the car, and Jaeger retrieved his search dog to search for drugs in the car.

While sniffing the outside of the car, the dog "alerted" to the presence of drugs in the area around the passenger side door. Jaeger then allowed the dog inside the car, whereupon it alerted twice more, this time on the passenger side front seat and behind the driver's seat in the vicinity of Cooper's duffel bag. Jaeger then searched the areas of the car where the dog had alerted. Under the front passenger seat (where Cooper had been sitting), Jaeger found a pack of cigarettes with some plastic hanging out of the flap. When he opened the cigarette pack, Jaeger found that it contained a brownish, chunky substance which he believed to be some kind of cocaine. An on-site Cobalt thicyanate test confirmed that the substance contained cocaine. The officers found no other drugs either in Cooper's duffel bag or elsewhere in the car. Subsequent fingerprint tests on the cigarette pack and on the bag containing the drugs yielded no identifiable prints. Cooper was arrested and charged with knowingly and intentionally possessing, with intent to distribute, cocaine base, schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1). Jemeir Brown was also arrested at the scene, but no drug-related charges were filed against him.

Before trial, Cooper's counsel filed a motion in limine to exclude any reference to the anonymous tip. The motion sought to bar the government from making "any direct or indirect mention whatsoever at trial before the jury of . . .

[the facts] [t]hat there was an anonymous tip concerning the Defendant traveling to the Wausau area with cocaine . . . [t]hat Detective Beecher of Milwaukee had informed Officer Jaeger that the defendant would be arriving in Wausau with cocaine, based on the anonymous tip." The motion argued that the tip was "unverified and unsubstantiated," that if admitted it would tend to show guilt without allowing Cooper to confront the tipster, that its probative value is "significantly outweighed by the prejudicial effect that it might have on . . . the members of the jury," and that "any objections to such evidence at trial, even if sustained and/or curative instructions given, would not remove the prejudicial effects thereof." During a pre-trial hearing on the motion before the Magistrate, the government asserted that it believed that case law clearly supported the admissibility of the fact that the tip was received by the police. The magistrate then stated, "I suppose the question would be how much detail you are allowed to put in [regarding the tip]." Cooper's counsel then replied, "Since I filed this motion in limine I have had additional discovery. Quite frankly at this point if it comes in, I don't have any objection." The Magistrate then offered, "If you want the government to brief it, that's fine." Cooper's counsel responded "No. At this particular point, first of all, I truthfully believe that probably it would come in to explain the officer's actions as far as the tip. Given, as I said, the newly discovered evidence, I think I will withdraw the entire motion. How's that sound?" The Magistrate again reminded Cooper's counsel that "[i]t's your choice. You are certainly entitled to be heard on it." However, Cooper's counsel reiterated "[n]o. I just as soon withdraw it [*sic*]." During a conference held on the first day of trial, the government confirmed with the district court and Cooper's counsel that it would be asking Jaeger to testify "as to tip information that he

received," and it explicitly stated that this information "would normally be perceived as hearsay." After the government reasserted its belief that case law supported the admissibility of the tip and reiterated that it was "advising the Court up front" that it would be eliciting Jaeger's testimony regarding the tip, the court asked Cooper's counsel if he had any response. Cooper's counsel said "Nothing in that regard, Your Honor."

At trial, both the government and Cooper's counsel referred extensively to the substance of the anonymous tip. In its opening statement, the government stated that it anticipated that the evidence would show that "[o]n April 16, 1999, law enforcement officers up in Wausau, Wisconsin received a tip by telephone and in that tip they learned that an individual would be arriving in Wausau that evening on the bus and a description matching Mr. Cooper and that individual would be carrying a quantity of drugs." Later, through its direct examinations of officers Jaeger and Peters, the government brought out more of the details of the tip, including the tipster's prediction that "a black male by the name of Brian Cooper" was coming to Wausau carrying several ounces of cocaine, that Cooper would be wearing either a gray FUBU style jacket or a black leather jacket with writing on it, that he would be carrying a duffel bag, and that he boarded a Greyhound bus which left Milwaukee at 2:30 and which would arrive in Wausau at 7:15. In its closing statement, the government summarized Jaeger's testimony and described the tip as "very accurate." At no point did Cooper's counsel object to any of the government's references to either the existence or the substance of the tip, nor did he request the court to provide any kind of a limiting instruction regarding the tip.

Cooper's counsel also made significant use of the substance of the tip during the trial. In his opening statement, Cooper's counsel stated: "But we have this anonymous tip. This is the link, if you will, and it's a call to the Milwaukee authorities advising, so I understand, that he [Cooper]'d be traveling by bus, arriving about 7:15, carrying several ounces of cocaine . . . That he was going to be wearing a gray FUBU jacket . . . or a black leather jacket . . . [a]nd that he would be carrying a black duffel bag." Similarly, in his cross-examination of Jaeger, Cooper's counsel asked "But basically the tip was that Brian Cooper would be arriving from the Milwaukee area and were you informed that it would be around 7:15? . . . And that he would be carrying a black duffel bag, correct?" Trial Trans. at 59-60. Finally, in his closing argument, Cooper's counsel again referred to the substantive details of the tip, this time using those details to suggest that Jetaun Brown, the wife of the car's driver, Jemeir Brown, was the only person who could have been the tipster: "Really there's only one person, one person who knew that in fact he was going to Wausau . . . that's Jetaun Brown . . . Again, what was the tip? The trip [*sic*] was that Brian Cooper would be arriving, that he in fact would be carrying a duffel bag . . . and that he would be there approximately 7:00, 7:15 . . . So who made the tip? . . . I think the evidence is that Jetaun Brown made the tip."

The jury convicted Cooper as charged. He asks us to vacate his conviction and to remand for a new trial, arguing that even though he forfeited objections to the admission of the substance of the tip by failing to object at trial, the district court plainly erred by allowing repeated reference to, and testimony regarding, the substance of the anonymous tip implicating Cooper. Cooper contends that the government's

references to the substance of the tip--which included a specific charge of criminality against Cooper--violated his rights to confront the witnesses against him and prejudiced the outcome of his trial, and that whatever probative value such statements had was substantially outweighed by their prejudicial effect. The government argues that we lack jurisdiction to review any such "error," because by withdrawing his motion in limine and using the substance of the tip in his theory of the case, Cooper waived (rather than forfeited) the issue.

DISCUSSION

Federal Rule of Criminal Procedure 52(b) provides a court of appeals "a limited power to correct errors that were forfeited because not timely raised in district court." United *States v. Olano*, 507 U.S. 725, 731 (1993). In such cases, the reviewing appellate court may correct an error committed by the district court provided that the error is "plain" and that it "affects substantial rights."[1] *Id.* at 732. However, FED. R. CRIM. PRO. 52(b) does not authorize an appellate court to review errors that have been waived, rather than forfeited. This is because when a party performs a valid waiver, technically there can be no "error" to correct regarding the right or issue waived, so all appellate review of the issue is extinguished. *See United States v. Newman*, 148 F.3d 871, 879 (7th Cir. 1998) (citations omitted). Therefore, as the

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[1]However, a court should exercise its discretionary authority to correct such an error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (citations omitted).

parties recognize, the threshold issue in this case is whether Cooper waived or merely forfeited any objection to the admission of the substance of the anonymous tip at trial.

Forfeiture is "the failure to make the timely assertion of a right," while waiver is "the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733 (citations omitted). Put another way, a forfeiture is an accidental or negligent omission (or an apparently inadvertent failure to assert a right in timely fashion), while a waiver is the manifestation of an intentional choice not to assert the right. We have found waiver where either a defendant or his attorney expressly declined to press a right or to make an objection. *See, e.g., United States v. Richardson*, No. 99-4309, slip op. at 5-6 (7th Cir. Jan. 25, 2001) (holding that a defendant waived an objection to a sentencing enhancement where at sentencing the court asked the defendant's lawyer whether he had an objection to the enhancement and the lawyer said "no"); *United States v. Scanga*, 225 F.3d 780, 783 (7th Cir. 2000); *United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000).

Applying these standards, we find that Cooper waived any objection to the admission of the tip's substance at trial. In withdrawing his original motion in limine, Cooper's counsel repeatedly stated that he had no objection to the tip's admission, despite the magistrate's offer to require the government to brief the issue, and its reminder that he "certainly had a right to be heard" on the matter. Even more significantly, Cooper's counsel referred to the details of the tip during his opening statement and his cross-examination of Jaeger, and then reiterated them during his closing argument to bolster his theory of the case (by suggesting that Jetaun

Brown was the only person who could have made the tip, and that she had done so perhaps out of frustration with both her husband and Cooper and because of her belief that they had plans to be with other women). Tr. Vol. 2 at 17-20. This was clearly a strategic decision rather than a mere oversight.

Cooper argues that, while his counsel waived any objection to the existence of the tip by withdrawing the motion in limine and failing to object at trial, he merely forfeited an objection to the admission of its substantive details. In support of this argument, Cooper notes that his counsel told the district court that he had no objection to the tip coming in "to explain the officer's actions." Cooper contends that this statement can be read as waiving an objection to the government's admission of the fact that the police had received an anonymous tip in order to explain why they had set up surveillance on Cooper, but not as waiving an objection to the substantive details of the tip. Noting that we must construe waiver principles liberally in Cooper's favor, *see United States v. Perry*, 223 F.3d 431, 433 (7th Cir. 2000), Cooper argues that we must find that he merely forfeited an objection to the admission of (or reference to) the tip's substance.

We reject this argument for several reasons. First, the motion in limine had sought to prevent the government from referring to either the existence or the substance of the tip. Cooper's counsel deliberately withdrew the motion, stating that he was doing so not only because he believed the tip could come in to explain the officer's actions, but also because discovery that he had conducted since he had filed the motion had uncovered new evidence. This suggests both that Cooper's counsel knew he was withdrawing an objection to

the admission of the tip's substantive details, and that he was doing so (at least in part) for strategic reasons.[2] Moreover, at no point did Cooper's counsel indicate that he was preserving an objection to the substance as opposed to the details of the tip, despite having several opportunities to do so both before and during trial. This alone might well justify a finding of waiver. *See United States v. Valenzuela*, 150 F.3d 664, 667-68 (7th Cir. 1998) (holding that defendant waived his right to appeal the issue of whether he had dealt crack cocaine as opposed to some other form of cocaine base where the

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[2]In his reply brief, Cooper notes that the fact that his counsel stated that he was withdrawing the motion in limine because he thought that it would come in to explain the officer's actions suggests that he thought that the content of the tip was admissible, and did not realize that he could object to its admission. Therefore, Cooper argues that his failure to object to the admission of the tip's substance was a neglectful error rather than a deliberate tactical decision, and that his use of the tip's substance at trial was merely an attempt to explain the tip away (and to minimize its harmful effects) in light of his mistaken conclusion that it was admissible. However, as we have noted, Cooper's counsel stated that he wanted to withdraw the motion in limine at least in part because he had "obtained additional discovery." This suggests that Cooper's counsel thought that he could use the substantive details of the tip to his advantage at trial, and casts doubt on Cooper's claim that he referred to the tip's substance at trial only as a desperate attempt to repair the damage caused by its admission. Moreover, the claim that Cooper's counsel was not aware that he could object to the admission of the tip's substance seems implausible given that the district court expressly gave him more chances to object after he announced his initial intent to abandon the motion, and told him that he was "certainly entitled to be heard" on the motion.

defendant's counsel "carelessly" conceded at sentencing that the defendant had dealt crack and did not include any limiting language in his concession). However, Cooper's counsel did much more than this. First, he brought the tip's substantive details out on his cross-examination of Jaeger and expressly referred to those details himself during both his opening statement and his closing argument.[3] Moreover, he never asked for any kind of limiting instruction to mitigate the

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[3]We find that Cooper's counsel's repeated reference to the substance of the tip at trial distinguishes this case from *United States v. Krankel*, 164 F.3d 1046 (7th Cir. 1998), which Cooper relies on for the proposition that we should apply the plain error analysis in this case. In *Krankel*, the defendant's counsel initially moved to exclude portions of a videotaped conversation to which the defendant was a party. However, on the morning of trial, the defendant's counsel withdrew the motion for tactical reasons, and thereafter failed to make any objection to the introduction of the unredacted tape at trial. While we used the language of "waiver," we analyzed the defendant counsel's actions under principles of forfeiture, and concluded that because the failure to object to the admission of the tape was a tactical decision, its admission was not plain error. *Id.* at 1053. ("'[W]here a defendant fails to object to the admission of evidence at trial because of a tactical decision, we are even more reluctant to find plain error.'" *Id.* (quotation omitted)). Cooper argues that *Krankel* dictates that we review his counsel's actions for plain error as well. However, whereas Krankel's counsel merely withdrew and withheld objections to the admission of certain evidence for tactical reasons, Cooper's counsel *affirmatively used* the evidence to which he now objects as part of his theory of the case. We are hard-pressed to interpret this as a forfeiture, and *Krankel* does not hold that we must do so.

potential harm of the admission of the substantive details.[4] Together, these actions demonstrate that Cooper's counsel deliberately chose to abandon any objection to the admission of the tip's substance.

We recently stated: "It is one thing to require judges to be alert to oversights that may affect substantial rights, and another to require them to override the clearly expressed wish of a party or his lawyer, which may be backed by excellent strategic reasons, not to invoke a particular right. The law has not taken the second step." *Richardson*, No. 99-4309, slip op. at 6. This principle applies with equal force here. Cooper's counsel made a clear strategic choice to use the substantive content of the tip. Even construing waiver principles liberally in Cooper's favor, we cannot characterize this as anything but a waiver.

One final point bears mentioning. "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Olano*, 507 U.S. at 733 (citations omitted). In this case, Cooper has argued that the admission of (and the government's repeated reference to) the anonymous tip's substance violated his Sixth Amendment

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[4]In addition, because the motion in limine stated that "[a]nd objection to such evidence at trial, even if sustained and/or curative instructions given, would not remove the prejudicial effects thereof," it is clear that Cooper's counsel was aware even before withdrawing the motion in limine that he could ask for a limiting instruction.

right to confront the witnesses against him. Constitutional rights, including the right to confrontation, can be waived. *See United States v. Hamilton*, 107 F.3d 499, 506 (7th Cir. 1997). However, "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quotation omitted). We have decided that Cooper's counsel waived any objection to the admission of the tip's substance by strategically using it and by failing to object to its admission both before and during trial. However, the government has not asserted that Cooper *personally* waived his right to make the objection. Therefore, assuming *arguendo* that the government's references to the tip's substance implicated Cooper's rights under the Confrontation Clause, we must determine whether Cooper's counsel could have effectively waived Cooper's right to make the objection on Cooper's behalf, notwithstanding the general presumption against a defendant's acquiescence in the waiver of his constitutional rights.

The majority of circuits that have addressed this question have held or stated that a defendant's attorney can waive his client's Sixth Amendment confrontation right "so long as the defendant does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy." *United States v. Reveles*, 190 F.3d 678, 683 n.6 (5th Cir. 1999) (internal quotation omitted). *See United States v. Plitman*, 194 F.3d 59, 64 (2d Cir. 1999); *Hawkins v. Hannigan*, 185 F.3d 1146, 1155-56 (10th Cir. 1999); *cf. Sahagian v. Murphy*, 871 F.2d 714, 716 (7th Cir. 1989) (holding that defendant waived his right to confront a witness

where his counsel objected to the government's request to delay the trial until the witness would be available for cross-examination and where there was some indication that the defendant had concurred in the objection, and no indication that he dissented); but *see Carter v. Sowders*, 5 F.3d 975, 981-82 (6th Cir. 1993) (holding that evidence that the defendant consented to not attend the video deposition of an adverse witness was required in order to bind him to his attorney's waiver of his confrontation rights). We agree with this conclusion. Since Cooper does not argue that he dissented from his attorney's decision to use the tip's substantive details and to refrain from objecting to the government's use of those details, and since Cooper has not presented any persuasive argument as to why the waiver could not have been a "legitimate trial tactic or part of a prudent trial strategy," we hold that his attorney effectively waived Cooper's right to object to the admission of the tip's substance, even if that right was guaranteed by the Sixth Amendment. *See Reveles*, 190 F.3d at 683 n.6.

CONCLUSION

We find that Cooper has waived any objection to the admission of or reference to the substantive details of the anonymous tip. Therefore, because there is no error to correct here, we decline to address Cooper's other arguments regarding plain error, and we **AFFIRM** his conviction.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit